No. 580

Supreme Court of the United States.

OCTOBER TERM, 1943.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, PETITIONER,

v.

ABRAHAM GOLDBERG, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States.

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THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, *Petitioner,*

v.

ABRAHAM GOLDBERG, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honourable the Justices of the Supreme Court of the United States:

The undersigned, on behalf of The Columbian National Life Insurance Company, petitioner, pray that a writ of certiorari may issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered August 31, 1943, as to which a rehearing was denied October 5, 1943, in the case between the above-named parties, docketed therein as No. 9464, affirming in part the judgment of the District Court for the Northern District of Ohio, Eastern Division, wherein the petitioner was defendant and the respondent plaintiff.

Opinions Below.

The memorandum opinion of the District Court (R. 74-76) was not published. The opinion of the Circuit Court of Appeals (R. 111-118) is published in 138 F. (2d) 192.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered August 31, 1943, and a petition for rehearing was denied October 5, 1943.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended, U.S.C. Tit. 28, § 347.

The jurisdiction of the District Court was based upon Section 274(d) of the Judicial Code, as amended, U.S.C. Tit. 28, § 400.

Questions Presented.

1. Is a judgment by a court sitting without jury to be affirmed where the court, though requested, fails to separate its findings of fact from its ultimate conclusion of law?

2. Is such a judgment, where the District Court has expressly refused to resolve a disputed question of fact, to be affirmed by the device of treating a ruling of law by the District Court as though it were a finding of fact warranted by the evidence?

3. Is not the Federal Court bound by the Ohio decisions that the burden is on the plaintiff to prove that he has brought himself within the insuring clause of his policy?

Statement of the Case.

The plaintiff below brought a petition for declaratory judgment against his insurer, the defendant below, asserting that although in his application for his policy he had stated his birth date to be December 15, 1878, in truth he was born on December 15, 1880. He asked that the policy be reformed so as to provide a higher face proportioned

to the lower premium consistent with his younger age, and asked further that it be adjudged that he was entitled to disability benefits under the accident and health contract for a total and permanent disability beginning July 1, 1938.

The policy provided for an adjustment of the insurance proportioned to the premium at the true age in case of misstatement of age. The accident and health contract, a part of the policy, provided:

> "If after one year's premium shall have been paid on this policy and before default in the payment of any subsequent premium the insured shall furnish to the company due proof that before attaining the age of sixty he has become wholly disabled by bodily injury or disease so that he is and thereby will be permanently and continuously unable to engage in any occupation whatever for remuneration or profit . . . thereupon the company will by endorsement hereon waive the payment of the premiums which thereafter may become due under this policy during the continuance of the said total and permanent disability of the insured."

The suit resulted in a finding that the insured became totally and permanently disabled on July 1, 1938. If he was born before July 1, 1878, his sickness did not bring him within the policy. If, however, he was born after July 1, 1878, he was entitled to the waiver of premium benefits. The vital point in the case is whether he was born before or after July 1, 1878. Although the date given in his application was December 15, 1878, he filed an affidavit (R. 72) that he believed the correct date of his birth to be December 15, 1880. Then he testified that he was born in December 1879 (R. 15). But his naturalization record showed that he was born May 15, 1878. The record is full of statements by him in which for the purpose of birth and

marriage records, etc., he had stated that he was born on various dates both before and after July 1, 1878.

The trial court in its memorandum opinion (R. 74-76) said that the evidence as to the plaintiff's birth date was in hopeless conflict, but held as matter of law that the policy established the date December 15, 1878, as conclusive.

> "It is the opinion of the court that the rights of the parties should be controlled by the date given in the policy. The Insurance Company knew, or should have known, the limits of the plaintiff's knowledge and his want of education at the time of issuing the policy. It should have satisfied itself then as to the correct age." (R. 76.)

This conclusion of law was the sole basis of the so-called "finding" submitted by the plaintiff's attorney and adopted by the court over the defendant's objection (R. 79-82), that the birth date was December 15, 1878. The court declined to state separately its findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure (R. 78). Under this decision, coupled with the finding (not assailed on appeal) that disability began July 1, 1938, the District Court decreed that the plaintiff was entitled to disability benefits. The Circuit Court of Appeals affirmed on the ground that the District Court had made a finding of fact supported by evidence, on a point as to which it erroneously held that the burden under the state law was on the defendant.

Specifications of Errors.

The Circuit Court of Appeals erred:

1. In affirming the judgment of the District Court when the District Court had failed to find the facts specially and state separately its conclusions of law thereon.

2. In affirming the judgment of the District Court on the ground of its having made a finding supported by evidence when the so-called finding

a) was unsupported by any evidence and
b) was in fact an erroneous conclusion of law.

3. In ruling that the burden of proving the plaintiff was not sixty when he became totally disabled was on the defendant.

Reasons for Granting the Writ.

(1) The Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The plaintiff below sought a declaration that he was entitled to disability benefits under a contract which provided he must be under sixty years of age when the disability commenced. The policy contained an age adjustment clause. Before filing his petition, and in the petition itself, the plaintiff repudiated the date of birth he had given in the application for the policy. Neither his evidence *nor* the defendant's evidence supported the application date. Nevertheless the District Court selected that date. It is demonstrably apparent from its memorandum opinion that the District Court selected this date as a conclusion of law on the theory that the company was legally bound by the application date (R. 76). The court expressly stated that it was not attempting to resolve the conflicting evidence on the date of birth as a question of fact (R. 75). The plaintiff below (see R. 79) prepared a document entitled "Findings of Fact, Conclusions of Law and Journal Entry," which he submitted to the defendant (R. 84). The defendant thereafter moved that the court find the facts separately under Rule 52(a) (R. 78). The court signed the document submitted by the plaintiff (R. 84), and *overruled the defend-*

ant's motion to make separate findings of facts (R. 78). This procedure was approved by the Circuit Court of Appeals.

(2) The Circuit Court of Appeals further departed from the accepted and usual course of judicial proceedings by predicating on this error of the District Court a further error of its own. The Circuit Court of Appeals affirmed the judgment of the District Court based on a conclusion of law, on the ground that it was based on a finding of fact supported by evidence, when there was no such finding *or any evidence to support it*. As a result the defendant stands concluded by a so-called finding of fact attributed to the District Court on an issue as to which that court expressly made no finding, and as to which there was no evidence in the record.

(3) The Circuit Court of Appeals erred in ruling that because of Ohio cases placing the burden of proving fraud or breach of warranty was on an insurer seeking to rescind, the burden was on the defendant to prove that the policy requirement that the plaintiff be under sixty when his disability commenced had not been met. In so ruling the court plainly disregarded, without discussion, settled apposite Ohio decisions.

Armstrong v. *Insurance Company*, 4 Ohio App. 46, 54.

John Hancock Mutual Life Ins. Co. v. *Hicks*, 43 Ohio App. 242, 183 N.E. 93.

Prayer.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Sixth Circuit commanding said court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record and all proceedings of

the said Circuit Court of Appeals in this case which was entitled in that court: *The Columbian National Life Insurance Company, Defendant-Appellant,* v. *Abraham Goldberg, Plaintiff-Appellee,* No. 9464, to the end that said cause may be reviewed and determined by this Court as provided by Section 240 of the Judicial Code as amended (U.S.C. Title 28, § 347), and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and that the said judgment of said Circuit Court of Appeals in the said case may be reversed by this Honourable Court and your petitioner will ever pray.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY,
By F. H. NASH,
C. J. HOYT,
Counsel for Petitioner.

Dated December 20, 1943.

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS:

F. H. Nash, being duly sworn, says that he is counsel for The Columbian National Life Insurance Company, the petitioner herein; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

F. H. NASH.

Sworn to and subscribed before me, this 20th day of December, 1943.

CARTER LEE,
Notary Public.

BRIEF IN SUPPORT OF THE PETITION.

Statement.

Statements regarding the opinion of the court below, the jurisdiction of this Court, the questions presented, and the errors assigned will be found in the petition.

Argument.

I. *A court sitting without jury should find facts specially when requested and separate its findings of fact from its conclusions of law.*

II. *A decision by a court sitting without jury is not to be affirmed as a finding of fact supported by evidence when it was in truth a conclusion of law unsupported by evidence.*

It will be more convenient to consider these two points together in order to avoid repetition.

This case involves an important question of Federal practice. The District Court, against the objection of the petitioner, defendant below, refused to comply with Rule 52(a) of the Federal Rules of Civil Procedure, which requires finding of facts specially, and stating separately the court's conclusions of law thereon (R. 78). Instead, the judge under a local rule delegated his judicial duty to the attorney for the respondent, plaintiff below (see R. 79, 82, 84), who stated in a composite document, but in the language of a finding of fact, what appears clearly from the judge's opinion to have been a ruling of law. The Circuit Court of Appeals then decided our appeal on the ground that the District Court's finding of fact was conclusive.

The District Court selected the application date because, as it said, the evidence of the insured's true date of birth

was in conflict, and "the rights of the parties should be controlled by the date given in the policy. The insurance company knew, or should have known, the limits of the plaintiff's knowledge and want of education at the time of issuing the policy. It should have satisfied itself then as to the correct age" (R. 76). It is abundantly apparent from this, as well as from other parts of the memorandum opinion, that the court's selection of the application date was not a special finding of fact on evidence. The court expressly refused to pass on the disputed evidence, and adopted the application date as a consequence. While loosely this adoption might perhaps be called a finding, it was not a finding on evidence, but an ultimate conclusion. The use of language suitable to a finding of fact in the "Findings of Fact, Conclusion of Law and Journal Entry" prepared by counsel for the plaintiff and signed by the court* imports no more than this, although it does, perhaps, create an apparent ambiguity until resolved. It is because of the importance of avoiding just such ambiguity that Rule 52(a) requires the separation of special findings and ultimate conclusions.

See *Tulsa City Lines* v. *Mains* (C.C.A. 10), 107 F. (2d) 377, 382.

Cf. *Interstate Circuit, Inc.*, v. *United States*, 304 U.S. 55.

Mayo v. *Lake Highlands Canning Co.*, 309 U.S. 310.

The other purpose, of course, is so that the appellate court may readily know what part of the decision is a finding

*A practice condemned in *United States* v. *Forness* (C.C.A. 2), 125 F. (2d) 928, 942, because such "mechanical" adoption may mean that "findings made by the district court are not supported by the evidence and not substantially in accord with the opinion."

of fact not to be set aside unless clearly erroneous, and what parts are legal conclusions which may be reversed.

Campana Corp. v. *Harrison* (C.C.A. 7), 114 F. (2d) 400.
United States v. *Armature Rewinding Co.* (C.C.A. 8), 124 F. (2d) 589.

It is not always easy to distinguish a finding from a conclusion or ruling.

Cf. *Manning* v. *Gagne* (C.C.A. 1), 108 F. (2d) 718.

The fact that the court labels it a finding is not conclusive.

Bendix Home Appliances v. *Radio Accessories Co.* (C.C.A. 8), 129 F. (2d) 177.

It is a common occurrence to send a case back to the District Court for proper compliance with the rule.

Interstate Circuit, Inc., v. *United States*, 304 U.S. 55.
Mayo v. *Lake Highlands Canning Co.*, 309 U.S. 310.
Humphrey v. *Helgerson* (C.C.A. 8), 78 F. (2d) 484.
Siano v. *Helvering* (C.C.A. 3), 79 F. (2d) 444.
Fitzhugh v. *Smith* (C.C.A. 8), 97 F. (2d) 893, and cases cited.

Instead, the Circuit Court of Appeals in the instant case, although the non-compliance with Rule 52(a) was assigned as error (R. 99, pt. 5), affirmed the decision, saying,

"Inasmuch as there was substantial evidence . . . which supported the finding of fact of the District

Court, that finding, not being clearly erroneous, is binding on this appeal." (R. 115.)

The court made no mention of the fact that the District Court had overruled the defendant's motion for a separate finding of facts and a separate statement of conclusions (R. 78), but instead fell a victim of the very confusion which strict observance of Rule 52(a) is intended to prevent. Doubtless it was misled by the "Findings of Fact, Conclusions of Law and Journal Entry" prepared by counsel for the plaintiff—which document embodied the very errors anticipated by the Circuit Court of Appeals for the Second Circuit, in that it contained "findings" "not supported by the evidence and not substantially in accord with the opinion."

United States v. *Forness* (C.C.A. 2), 125 F. (2d) 928, 942.

We have already pointed out that the court's selection of December 15, 1878 as the date of the plaintiff's birth was because it was the application date "which the parties accepted when the policy was made. It is the opinion of the court that the rights of the parties should be controlled by the date given in the policy. The insurance company . . . should have satisfied itself then as to the correct age." (R. 76.) This selection was thus not a finding of fact, but a conclusion or ruling of law.* In reciting it in the document he prepared for the court's signature as a finding,

*As a ruling of law it was, of course, erroneous. Where the policy contains an age adjustment clause (R. 41) (an age adjustment clause was required by Ohio law—General Code, § 9420) the policy date cannot be controlling; *Metropolitan Life Ins. Co.* v. *Levy* (N.J.) 30 Atl. (2d) 571; particularly where, as here, the plaintiff came into court admitting that the date stated in the application was erroneous (R. 4, 15).

plaintiff's counsel clearly did not proceed "substantially in accord with the opinion."

Furthermore, there was no evidence in the record which would justify a finding of December 15, 1878 as the plaintiff's date of birth, as alleged in the first instance, not by the District Court, but by the Circuit Court of Appeals (R. 114, 115). The Circuit Court of Appeals stated that there was substantial evidence that the plaintiff "had not reached sixty years in age on July 1, 1938" in the testimony of the plaintiff and his elder brother (R. 114). But this testimony was that the plaintiff was born in December, 1879 (R. 15, 23, 31) and was *manifestly not believed by the court* when it selected December 15, 1878. How, then, could the Circuit Court of Appeals conclude (R. 114, 115) that the court's "finding" was supported by this "substantial evidence"? There was no other substantial evidence warranting December 15, 1878. The remaining evidence was as follows:

1. May 15, 1878	Naturalization records (R. 26)
2. December 21, 1877	Plaintiff's statement to U.S. Marshal (R. 29)
3. December 15, 1879	Disability claim (R. 52)
4. 1879-80	Certificate of admission of Alien (R. 56)
5. 1877-78	Marriage license (R. 59)
6. December 15, 1878*	Plaintiff's 1931 disability proof
7. 1876-77	Child's birth certificate (R. 63)
8. 1877-78	Child's birth certificate (R. 65)

*It is to be doubted whether this statement to the effect that the records of a California doctor showed December 15, 1878 amounted to even a scintilla of evidence in favor of the plaintiff, particularly after he had testified finally that his true birthdate was 1879.

9. 1876-77	Child's birth certificate (R. 67)
10. December 15, 1880	Plaintiff's sworn age statement submitted before trial (R. 72)

There remains the statement in the application itself, where the date December 15, 1878 appears. Even aside from the fact that this prior statement by the plaintiff was repudiated by him at the trial, it was not evidence in its own support.

Pence v. *United States*, 316 U.S. 332, 339.

Thus the District Court *could not* have found on evidence that the plaintiff was born on *December 15, 1878*. The date was contrary to the evidence of both parties. The court might have found he was "under sixty" on July 1, 1938, but it *did not* make such a finding. That was a conclusion from its arbitrary selection of the application date, though that date was rejected by both parties, as binding on them. The Circuit Court of Appeals, in holding that a ruling of law that the defendant was bound by the application date is to be affirmed as a "finding of fact" supported by "substantial evidence," not only erred in failing to distinguish between findings and conclusions, but overlooked the fact that *the evidence would not have justified such a finding of fact had the court chosen to believe it—which it had stated it did not.*

III. *The Circuit Court of Appeals disregarded the applicable state law in ruling that the burden was on the defendant to prove that the plaintiff had not brought himself within the insuring clause.*

The policy provided disability benefits "If . . . the Insured shall furnish to the Company due proof that, before

attaining the age of sixty, he has become totally disabled" (R. 45). The Circuit Court of Appeals held that

> "the burden of proof rested upon appellant (the defendant) to show appellee had attained the age of sixty before he became totally and permanently disabled." (R. 115.)

It relied upon Ohio cases placing the burden of proving fraud or breach of warranty upon an insurer alleging such defenses.

The question which party has the burden of proof is serious, and if not decided in accordance with the applicable law as established by the Supreme Court is settled ground for certiorari.

New York Life v. *Gamer,* 303 U.S. 161.

The question is substantial, not procedural.

Cities Service Oil Co. v. *Dunlap,* 308 U.S. 208.

Where a policy in an insuring clause requires certain facts to appear at the time liability is asserted, under settled Ohio decisions the burden of proving compliance is on the plaintiff.

Armstrong v. *Ins. Co.,* 4 Ohio App. 46 (plaintiff in accident policy must disprove disease).

John Hancock Mutual Life Ins. Co. v. *Hicks,* 43 Ohio App. 242, 183 N.E. 93 ("disease contracted after date hereof"—plaintiff has the burden).*

*That the *Hicks* case and not the court's principle applies is evidenced by the fact that the defendant is not "contesting" the policy, as pointed out in *Pekras* v. *Prudential Ins. Co.*, 10 N.E. (2d) 704, 705, discussing the *Hicks* case.

These cases are squarely in point. The Circuit Court of Appeals discussed remote and inapposite Ohio cases, but refused even upon the petition for rehearing to consider these cases.

Respectfully submitted,

F. H. NASH,

C. J. HOYT.

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(20)

In the Supreme Court of the United States

OCTOBER TERM 1943.

No. 580.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

ABRAHAM GOLDBERG,

Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

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Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

We respectfully submit that the mere statement of the case will show that there is nothing in this record deserving of review by this Court.

The Respondent in a suit for a declaratory judgment on a life insurance policy claimed as ultimate facts that

(1) he was totally disabled by bodily disease so that he was unable to engage in any occupation for profit;

(2) this total disability attached before he attained the age of sixty.

The United States District Court without a jury heard the factual evidence on these ultimate facts and resolved them affirmatively in favor of the Respondent. The Finding of Facts states the following ultimate facts which were in controversy:

(a) The date of the birth of the Respondent—Dec. 15, 1878;

(b) The date the Respondent became disabled—July 1, 1938;

(c) Whether the disability was permanent—Permanent.

The trial court is not required by Rule 52 to make rulings on all the facts presented and need only find the ultimate facts as are necessary to reach a decision in the case and the judgment should stand if the opinion below gives the appellate court a clear understanding of the basis of the decision[1] even if the rule is violated.[2] The memorandum

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[1] *Klimkiewicz v. Westminster Deposit & Trust Co., et al.*, United States Court of Appeals for the District of Columbia. Decided Sept. 22, 1941. 122 Fed. Rep. 2d, 957. Certiorari denied. 315 U. S., 805:

"Syl. 2. Under the new federal procedural rules, the trial court is not required to make findings on all the facts presented but need only find such ultimate facts as are necessary to reach the decision in the case. *Federal Rules of Civil Procedure*, rule 52, 28 U. S. C. A. following section 723c."

"Syl. 3. A judgment, attacked on appeal on ground that district court's findings of fact do not comply with court rule, should stand if the opinion below gives the appellate court a clear understanding of the basis of the decision. *Federal Rules of Civil Procedure*, rule 52, 28 U. S. C. A. following section 723c."

[2] *Goodacre v. Panagopoulos et al.*, United States Court of Appeals for the District of Columbia. Decided March 4, 1940. 110 Fed. Rep. 2d, 716, 718:

"The District Court evidently failed to comply with the requirement of Rule 52(a) that it 'find the facts specially and state separately its conclusions of law thereon.' It does not follow that we must reverse the judgment. Like its predecessor, Equity Rule 70½, Rule 52(a) 'is intended to aid appellate courts by affording them a clear understanding of the basis of the decision below.' We have held that, when this clear understanding is afforded, the judgment may stand although the rule is violated."

* * * * *

"We do not understand *Interstate Circuit, Inc. v. United States* (cited by Respondent), to require reversal for a merely formal failure to comply with the rule. It is true that the Supreme Court there emphasized the fact that the District Court did not 'find the facts specially and state separately its conclusions of law as the rule required.' But the vice of the findings there was not merely that they were informally made. Although the District Court, in its opinion, made many findings of underlying facts, it nowhere made some of the findings which the majority of the Supreme Court thought necessary to an understanding of the decree."

opinion of the trial judge was adopted *in toto* on the question of the date of birth of the Respondent, the only issue of fact concerning which there is a dispute now, which is the best proof that the Circuit Court of Appeals understood the basis of the decision of the trial judge.

The difference in the Findings of Fact adopted by the trial court (R. 83) and complained of by the Petitioner and the findings of fact tendered the trial court by the Petitioner (R. 87, 88, 89, 90) is as follows:

Findings of Fact of Trial Court	Findings of Fact Proposed by Petitioner
Date of Birth December 15, 1878	Date of birth May 15, 1878
Disability permanent	Disability temporary (this was abandoned by the Petitioner in the Circuit Court of Appeals, Petitioner admitting that there was sufficient evidence to warrant a finding of permanent disability)
Disability occurred July 1, 1938	Disability occurred June or July, 1938 (Petitioner admitted in the Circuit Court of Appeals that disability occurred July 1, 1938 (R. 98))

The claim that the trial court did not separately state its Findings of Fact as required by Rule 52 is without merit.

The United States District Court and the Circuit Court of Appeals considered all the matters of evidence argued in Petitioner's brief and considerably more, as the record indicates, and resolved all the evidence in favor of the Respondent. There can hardly be any question but that both of these courts correctly decided the question of fact as to when the insured was born and whether he became disabled before attaining the age of sixty, and there likewise can be no question but that the correctness or incorrectness of this determination of fact on this ultimate issue of fact is not subject matter deserving of review by this Court.

The Petitioner argues that this Court should admit this case pursuant to Rule 38, paragraph 5, sub-division b, in that the Circuit Court of Appeals disregarded the applicable state law in ruling that the burden was on the Petitioner to show that the Respondent had not brought himself within the insuring clause. A reading of the opinion of the United States District Court leaves but one conviction, to-wit, that regardless as to who had the burden of proof, the trial court found that the greater weight of the evidence showed that the Respondent was totally disabled before he attained his sixtieth birth date. If this case were tried to a jury in the United States District Court, the question of burden of proof would have been important so far as the charge of the Court to the jury is concerned, but in the instant case, where both parties went forward with their evidence, and the United States District Court as the trier of facts found that the Respondent's disability was total and attached before attaining the age of sixty by the greater weight of the evidence, the question as to who had the burden of proof is immaterial, and any statements concerning the burden of proof made by the United States Circuit Court of Appeals is *obiter dictum*. Even that *obiter dictum* is correct.

With reference to the cited case of *Armstrong v. Insurance Co.*, 4 Ohio Appeals 46, we wish to point out that the cited case involved an accident policy and the court admitted, at page 56, that a different rule applies "in actions brought upon an ordinary life or fire insurance policy to actions based upon accident policies." The cited case of *Hancock Insurance Co. v. Hicks*, 43 Ohio Appeals 242, 183 N. E. 93, involved a claim by the insurer that the disability arose prior to the delivery of the policy and a claim by the insured that the insurer could not raise this defense because of the incontestability clause, issues which are not in the case at bar. The ruling of the Court in the *Hicks* case that the defense of the insurer was not barred by the

incontestable clause has been repudiated as an authority in Ohio; the *Hicks* case was the only Ohio case referred to by the court in the case of *Metropolitan Life Ins. Co. v. Onstott*, 31 Ohio Nisi Prius (New Series) 374, and that decision was reversed by the Court of Appeals for the First Appellate District of Ohio which decision is unreported but available and the Supreme Court of Ohio overruled a motion to certify the decision of the said First Appellate District Court. Further, syllabus three in the *Hicks* case states that "an insurer must plead and prove exceptions to the risk covered by policy" which the Petitioner insurer in the case at bar undertook to do but failed to do.

In addition to the Ohio cases cited by the Circuit Court of Appeals to support its conclusion (R. 115) it is stated in the case of *Langan v. United States Life Ins. Co.*, 130 S. W. 2d, 483:

> "Of course, the burden is upon the insurer to prove the incorrectness of the stated age of the insured."

In the case of *Wolen v. Metropolitan Life Ins.*, 5 N. E. 2d, 249, syllabus 8 states:

> "In a suit on life policy containing double indemnity clause the burden was on insurer to show that the insured understated his age in his application for insurance."

Syllabus 9: "Statements made by the insured presumed to be truthful and the defense that the insured understated his age in his application is required to be proved by clear and cogent evidence."

Couch in his work on *Insurance* states, Vol. 8, page 7342:

> "In the absence of proof to the contrary, a presumption exists that the applicant has truly stated his age wherefore the insurer, relying on a forfeiture for misstatement of age, has the burden of proving the falsity."

We suggest that the language in the policy providing that the waiver of premium benefits are to be ineffective after the insured attains the age of sixty is in the nature of a defeasance, an exemption of liability, and is a condition subsequent and the burden was on the Petitioner to prove that the Respondent had not brought himself within the meaning of the insuring clause.[3]

We suggest that if it is a condition precedent to recovery that the Respondent show that the disability arose before he attained the age of sixty, the Respondent made out a prima facie case by offering the policy in evidence

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[3] *Humble v. The John Hancock Life Insurance Co.*, 28 Ohio Nisi Prius, New Series, 481, 483. Affirmed 31 N. E. 2d, 887:

"The question involved here is with reference to burden of proof, rather than being one of directed verdict. The plaintiff made a prima facie case when she showed that the policy was issued and delivered to the insured; that the premiums were paid; and, that proper notice and demand were made upon the defendant for payment of said policy. This being the case it was incumbent upon the defendant to offer some evidence sustaining its defense. When this was done it became a question of fact for the jury to determine whether or not the insured was in sound health on the date of the policy, and whether or not she had been attended by a physician for a serious disease within two years prior to that time. The question, therefore, is: Did the court properly charge the jury upon the burden of proof with reference to these two defenses? Counsel for the defendant in their brief claim that these provisions of the policy were conditions precedent, and that the burden of proof is, therefore, upon the plaintiff to establish by a preponderance of the evidence that these conditions have been performed. We think it is well established in this state that such conditions have been termed conditions subsequent, and as such the burden of proof is upon the defendant."

Mumaw v. The Western & Southern Life Insurance Co., 97 Ohio State, 1, 9:

"It is more in the nature of a defeasance, where the insured contracts that, if the representations made by him are not true, the policy shall be defeated and avoided. But, even if these warranties are to be deemed conditions precedent, it has become settled in insurance law, for practical reasons, that the burden is on the insurer to plead and prove the breach of the warranties."

(see *Humble v. The John Hancock Life Ins. Co., supra*, and *Goell et al. v. U. S. Life Ins. Co.*, 40 N. Y. S. 2d, 779, decided April 9, 1943)[4] which presumption stands until the Petitioner goes forward and clearly proves that the Respondent's statements as to age as contained in the application, were wilfully false, fraudulently made, etc.[5] The Petitioner argues that the burden is on the Respondent to go forward and that the Respondent has the burden as a condition precedent to recovery, to show his date of birth.

The effect of Ohio General Code Section 9391 cannot be escaped by the device of contracting to the contrary or labeling the contractual attempt to do so a "condition precedent" to the attaching of the risk or putting the bur-

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[4] "Syllabus 1: "In action to recover disability payments due under a life policy, where insurer sought reformation on ground that insured had misrepresented his age, plaintiff made out a 'prima facie case' by offering the policy in evidence and giving proof of his disability."

Syllabus 2: "Presumption that age stated in life policy is true age stands until rebutted by evidence which may fairly satisfy the jury that insured was in fact of some other age which would preclude insured's right to any recovery."

Syllabus 3: "Insurer had the burden of establishing affirmative defense that either by mutual mistake or unilateral mistake on part of insurer and fraud of insured, life policy did not represent true agreement between parties, in that insured's disability occurred after the anniversary of the life policy on which insured's age at nearest birthday was 60 years."

[5] Ohio General Code Section 9391:

"No answer to any interrogatory made by an applicant, in his or her application for a policy, shall bar the right to recover upon any policy issued thereon, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is wilfully false, was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, also that the agent or company had no knowledge of the falsity or fraud of such answer." (This section when enacted contained the caption, "An act for the better protection of holders of life insurance policies.")

den on the insured to prove the truth of any representation he makes in his application for a policy.[6]

The policy, in addition to providing for waiver of premiums in the event the Respondent became disabled before attaining the age of sixty, also provides in Paragraph 4 (R. 45):

"Premium and Discontinuance.

The annual premium for the benefit provided in this section is Ten Dollars ($10.00) payable in addition and in the same manner as regular premiums under this contract, but not beyond age sixty."

By the terms of this policy, even as construed by the Petitioner, actual age and not age at the anniversary of the policy at nearest birth day, is the governing factor. By the terms of this policy the premium for this benefit was payable annually on March 22nd of each year. On March 22, 1938 the Respondent had not attained the age

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[6] *Prudential Ins. Co. of America v. Saxe*, United States Court of Appeals for the District of Columbia. Decided Jan. 25, 1943. Writ of Certiorari Denied May 3, 1943. 134 Fed. Rep. 2d, 16, 24, 25:

"Since the full first premium was not paid at the time of making the application, Prudential insists this clause made the truth of the statements 'conditions precedent to attaching of the risk,' and that they were not fulfilled because the statements were not true in fact. In this view it would be immaterial whether the insured knew they were contrary to fact or intended them to deceive, or whether they were material to the risk or its acceptance. An entirely innocent misstatement, whether or not material, would keep the policy from taking effect. This, in substance, would make the statements warranties. It also would nullify the intended effect of Section 35-414. That section, at the very least, was intended to prevent innocent and immaterial misrepresentations in the application from avoiding the insurance, and its effect cannot be escaped by the device of contracting to the contrary or labelling a contractual attempt to do this a 'condition precedent' to attaching of the risk. The very purpose of the action was to nullify contractual provisions contrary to its terms and effect. If therefore the so-called 'condition precedent' is by its terms more broadly effective than the statute allows, to that extent it is invalid." (Section 35-414 referred to is similar to Ohio General Code 9391.)

of sixty, whether he was born on May 15, 1878 as claimed by Respondent or December 15, 1878 as found by the lower courts. The Petitioner therefore on March 22, 1938 collected an annual premium for this benefit. The Petitioner cannot consider the policy effective for the purpose of collecting premiums to March 22, 1939, and not consider the policy effective for the purpose of coverage to March 22, 1939.

We suggest that since Ohio General Code Section 9420(5) provides[7] that the company has only the right to *reduce the amount payable* if the age of the insured is understated; we seriously doubt whether the company has the right to *defeat* recovery of waiver of premium benefits because of an understatement of age.

It is stated in the case of *Insurance Co. v. Snyder*, 52 Ohio Appeals, 438, 445, that

> "We hold the provisions of Section 9420, General Code, must be read into the policy in question, and that the statutory provisions are controlling, even where opposed to the express provisions of the policy, unless the policy provisions are more favorable to the insured than are the statutory requirements."

We most respectfully submit that the Petition for a Writ of Certiorari should be denied.

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Louis Gelbman,

Attorneys for Respondent.

David C. Haynes,

Of Counsel.

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[7] Ohio General Code Section 9420:

"Policies other than standard forms. No policy of life insurance in form other than as provided in sections 9412 to 9417, both inclusive, shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state unless the same shall contain the following provisions: * * * (5) A provision that if the age of the insured has been understated the amount payable under the policy shall be such as the premium would have purchased at the correct age."